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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 SHANE HUDECEK,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of
15 Social Security Administration,

16 Defendant.

17 No. CASE NO. C08-5340BHS

18 REPORT AND RECOMMENDATION

19 Noted for May 1, 2009

20 This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28
21 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews,
22 Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been briefed, and after
23 reviewing the record, the undersigned recommends that the Court affirm the administration's
24 decision.

25 INTRODUCTION AND PROCEDURAL HISTORY

26 Plaintiff, Shane Hudecek, was born in 1953. She obtained a general education diploma,
and she has taken classes for cosmetology training. Most recently she worked as a real estate
agent. Ms. Hudecek has past experience working as a secretary/administrative assistant,

1 cosmetologist, beauty supply store manager, census worker, newspaper delivery person, taxicab
2 driver, tavern bartender, and as a real estate salesperson (Tr. 135-42). The evidence indicates
3 that she has actively engaged in prostitution (Tr. 21, 317-22). Ms. Hudecek was 47 years old
4 when she alleged that she became disabled in 2001 (Tr. 549). She alleges disability due to
5 depression, personality disorder, and post-traumatic stress disorder. Plaintiff's Opening Brief at
6 2.
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8 Ms. Hudecek, previously filed an application for Supplemental Security income (SSI)
9 disability benefits under Title XVI of the Social Security Act (Act) on April 12, 2002, and an
10 application for a period of disability and disability insurance benefits (DIB) under Title II of the
11 Act on May 21, 2002 (Tr. 19, 540-41). In both applications, she alleged that she had been
12 disabled since September 1999 (Tr. 19). Her claims were denied initially on July 26, 2002
13 (Tr. 19). She did not appeal the denials (Tr. 19).

14 On October 15, 2003, the claimant filed her current applications for DIB and for SSI
15 disability benefits (Tr. 19). In both applications, she alleged disability beginning August 25,
16 2001 (Tr. 19). The claims were denied initially and on reconsideration (Tr. 19). The claimant
17 filed an untimely request for a hearing before an ALJ (Tr. 19). Good cause was found for the
18 late filing, and an administrative law judge ("ALJ") conducted the hearing on September 21,
19 2006, in Seattle, Washington (Tr. 19, 571-603).

20 On October 19, 2006, the ALJ issued a decision unfavorable to the claimant. He noted
21 that the claimant had not provided new and material evidence to support reopening the prior
22 denials, and that, therefore, the prior denials were administratively final (Tr. 19). 20 C.F.R. §
23 404.987ff (2008). Accordingly, the relevant period under consideration began the day after the
24 prior final decision, on July 27, 2002. The ALJ found that the claimant had not been under a
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1 “disability,” as defined in the Social Security Act, from July 27, 2002 through the date of his
2 decision (Tr. 16-30). The Appeals Council denied the claimant’s request for review, making the
3 ALJ’s decision the Commissioner’s final decision that is subject to judicial review. 20 C.F.R. §§
4 404.1481, 416.981, 422.210.

5 STANDARD OF REVIEW

6 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
7 social security benefits when the ALJ’s findings are based on legal error or not supported by
8 substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d 1211, 1214 (9th
9 Cir.2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such
10 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
11 Richardson v. Perales, 402 U.S. 389, 201 (1971); Magallanes v. Bowen, 881 F.2d 747, 750 (9th
12 Cir.1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
13 testimony, and resolving any other ambiguities that might exist. Andrews v. Shalala, 53 F.3d
14 1035, 1039 (9th Cir.1995). While the Court is required to examine the record as a whole, it may
15 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. Thomas
16 v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than
17 one rational interpretation, it is the Commissioner’s conclusion that must be upheld. Id.
18

19 Plaintiff bears the burden of proving that he or she is disabled within the meaning of the
20 Social Security Act (the “Act”). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act
21 defines disability as the “inability to engage in any substantial gainful activity” due to a physical
22 or mental impairment which has lasted, or is expected to last, for a continuous period of not less
23 than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the
24 Act only if his or her impairments are of such severity that he or she is unable to do her previous
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1 work, and cannot, considering his or her age, education, and work experience, engage in any
2 other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
3 1382c(a)(3)(B); Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

4 The Commissioner has established a five-step sequential evaluation process to determine
5 whether an individual is disabled as defined under the Social Security Act. 20 C.F.R. §§
6 416.920, 404.1520. The United States Supreme Court recognized the validity of this analysis in
7 Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987), and it remains the proper approach for
8 analyzing whether a claimant is disabled.

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10 This five-step process is summarized as follows. First, the Commissioner considers
11 whether the claimant is currently engaged in substantial gainful activity. If not, the
12 Commissioner next considers whether the claimant has a “severe impairment” that significantly
13 limits the claimant’s physical or mental ability to do basic work activities. If the claimant has
14 such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant
15 has an impairment listed in Appendix 1 of the regulations. If the claimant has such an
16 impairment, the Commissioner will consider the claimant disabled without considering
17 vocational factors such as age, education, and work experience; the Commissioner presumes that
18 a claimant who is afflicted with a “listed” impairment is unable to perform substantial gainful
19 activity. Assuming the claimant does not have a listed impairment, the fourth inquiry is whether,
20 despite the claimant’s severe impairment, the claimant has the residual functional capacity to
21 perform his or her past work. Finally, if the claimant is unable to perform his or her past work,
22 the Commissioner then determines whether there is other work the claimant could perform.
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25 Plaintiff has the burden of proof as to the first four steps; the Commissioner has the
26 burden of proof on the fifth and final step. Bowen, 482 U.S. at 146 n. 5. The final or fifth step of

1 the process is, in turn, divided into two parts. First, the Commissioner must assess the claimant's
2 job qualifications by considering physical ability, age, education, and work experience. Second,
3 the Commissioner must determine whether jobs exist in the national economy that a person
4 having the claimant's qualifications could perform. 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. §§
5 416.920(g); 404.1520(g); Heckler v. Campbell, 461 U.S. 458, 460 (1983).

6 Here, Plaintiff argues, in her Opening Brief, the ALJ's decision is not properly supported
7 and the ALJ committed the following specific errors during the five-step evaluation process:

8 1. The ALJ committed legal error by failing to find that Ms. Hudecek's gamekeeper's
9 thumb, rheumatoid arthritis, hearing loss, left shoulder pain, and mental impairments are severe
10 impairments;

11 2. The ALJ committed legal error by using Ms. Hudecek's activities of daily living to
12 discredit her testimony;

13 3. The ALJ committed legal error by failing to find that Ms. Hudecek's severe low back
14 condition does not meet or equal a Listing;

15 4. The ALJ committed legal error by failing to find that Ms. Hudecek's severe mental
16 health conditions do not meet or equal a Listing;

17 5. The ALJ committed legal error in determining that Ms. Hudecek retains the residual
18 functional capacity to perform her past work as an administrative assistant; and

19 6. The ALJ committed legal error in not assessing Ms. Hudecek's ability to perform
20 other work that exists in the national economy.

21 After carefully reviewing the briefing and record, the undersigned finds the ALJ properly
22 considered Plaintiff's alleged limitations and rejected them. Plaintiff's credibility is a significant
23 issue. There is substantial evidence of malingering by the claimant to support the ALJ's decision
24 that Plaintiff is not "severely impaired." Therefore, this court recommends that the District
25 Court affirm the ALJ's decision.

DISCUSSION

A. *The ALJ Properly Discredited Plaintiff's Statements And Allegations Regarding The Severity Of Her Impairments*

Credibility determinations are particularly within the province of the ALJ. Andrews, 53 F.3d at 1043. Nevertheless, when an ALJ discredits a claimant's subjective symptom testimony, the ALJ must articulate specific and adequate reasons for doing so. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir.2006). The determination of whether to accept a claimant's subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; Smolen, 80 F.3d at 1281. First, the ALJ must determine whether there is a medically determinable impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); Smolen, 80 F.3d at 1281-82. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms solely because they are unsupported by objective medical evidence. Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir.1991) (*en banc*). An ALJ is not “required to believe every allegation of disabling pain” or other non-exertional impairment. Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.1989). When evaluating a claimant's credibility, however, the ALJ “must specifically identify what testimony is not credible and what evidence undermines the claimant's complaints.” Greger, 464 F.3d at 972 (*internal quotation omitted*). General findings are insufficient. Smolen, 80 F.3d at 1284; Reddick, 157 F.3d at 722.

Absent affirmative evidence that the claimant is malingering, the ALJ must provide “clear and convincing” reasons for rejecting the claimant's testimony. Smolen, 80 F.3d at 1284; Reddick, 157 F.3d at 722. However, if an ALJ finds evidence of malingering, claimants' testimony may be rejected using “‘ordinary techniques of credibility evaluation,’ ” and the ALJ's own observations at the hearing. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th

1 Cir.2001) (*quoting Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir.1991)). Ordinary techniques
2 of credibility evaluation include, the claimant's reputation for truthfulness, inconsistencies in
3 testimony and conduct, daily activities, work record, and the testimony from physicians and third
4 parties concerning the nature, severity, and effect of the symptoms of which the claimant
5 complains. *Smolen*, 80 F.3d at 1284.

6 Here, there is significant evidence, cited to by the ALJ, concluding that Plaintiff
7 exaggerated her medical symptoms and allegations of disability. The ALJ wrote:
8

9 The claimant has shown a penchant to magnify her symptoms and limitations
10 during examination. In November 2003, Dr. Quint noted a slightly antalgic gait
11 with a slight limp. Yet, he also observed during the examination that she could
12 walk down the hall without a limp, sit comfortably, get on and off the
13 examination table, walk without apparent discomfort or problems with her knees,
walk in heel-toe and tandem fashion, and show good balance. Dr. Quint could not
test complete range of motion because of poor effort. He noted that the claimant
“frequently breathes hard in an exaggerated fashion” (Exhibit 11F).

14 In August 2006, Dr. Whitehill noted that an administration of the MMPI-2 yielded
15 an invalid profile as a result of excessive symptom endorsement (Exhibit 21F/4).

16 The record includes investigative evidence that contradicts the claimant’s
17 allegations of disabling physical limitations. In February 2004, the Cooperative
18 Disability Investigations Unit conducted an investigation because of possible
19 fraud. The detectives interviewed one witness who had known the claimant since
20 August 2003. The witness reported seeing the claimant “walking around all the
21 time.” The witness stated that the claimant was “very mobile” and was
22 “constantly coming and going.” The witness recalled seeing the claimant carrying
23 a cane for two days in December 2003, but, after a couple of days, she was
24 walking normal again. The witness had not seen her with a cane since. The
25 witness indicated that the claimant did not have any physical issues and chuckled
26 about the amount of men at her trailer, suggesting that she could not be that
physically hurt. The detectives also contacted another witness, who was the
claimant’s landlord from April to August 2003. The witness reported seeing
several men over all the time. The witness recalled that the claimant was always
driving and owned a truck that was not always working. The witness reported
observing on more than one occasion that the claimant and one of the men had to
push the truck through the trailer park to the gate. The witness stated that the
claimant complained of having a bad back and would “pretend” to be hurt. When
the claimant did not know the witness was watching, she would walk fine and
even pick up heavy items. The witness also showed detectives Polaroid photos of

1 the trailer with numerous items around the door. The witness stated that when the
2 claimant was kicked out, she picked up all of the items herself, some of which
3 appeared to be heavy, set them in her truck, and hauled them out of the park. The
4 investigative report concluded that “[b]ased on a preponderance of evidence, there
5 is reason to believe that the claimant knowingly provided false information
6 concerning [her] functional limitations” (Report of Investigation, February 19,
7 2004).

8 The claimant’s credibility is not enhanced by her testimony at the hearing. The
9 claimant outright denied engaging in prostitution despite her own reports and
10 reports by witnesses suggesting the contrary. She also testified that it was
11 inaccurate that she abused drugs. Yet, in May 2002, the claimant reported using
12 crack approximately one time per week “for years” and using crack cocaine just
13 two weeks prior (Exhibit 13F/34). In August 2002, the claimant indicated that
14 she continued to do drugs recreationally when she could afford them (Exhibit
15 4F/53). In August 2006, Dr. Whitehill diagnosed cannabis abuse (Exhibit 21F/2).
16 The claimant also has a history of incarceration. In May 2002, the claimant
17 reported recently being incarcerated for several days due to auto theft and drug
18 possession (Exhibit 13F/31).

19 Tr. 27-28. The ALJ discounted the opinions of Dr. Quint, Dr. Tonder, the State agency medical
20 consultant, and Ms. Chapman (an ARNP) to the extent they relied on Plaintiff’s subjective
21 complaints. The ALJ accepted Plaintiff’s statements and allegations only to the extent that they
22 were consistent with an ability to perform sedentary work. Tr. 29.

23 Plaintiff argues that the ALJ improperly relied on the claimant’s daily living activities to
24 discredit her allegations of total disability. As noted above, the undersigned is not persuaded by
25 this argument. In addition to the inconsistent statements Plaintiff made regarding her activities,
26 the ALJ relied on the evidence referenced above to properly discredit her allegations of complete
disability. Substantial evidence in the record supports the legitimate reasons provided by the
ALJ to discount Plaintiff’s testimony and allegations.

1 ***B. The ALJ Properly Evaluated Plaintiff's alleged "Severe" Mental Impairments***

2 Plaintiff alleges that the ALJ should have found that her diagnoses of gamekeeper's
3 thumb, rheumatoid arthritis, hearing loss, left shoulder pain, and mental impairments were severe
4 impairments.

5 Step-two of the administration's evaluation process requires the ALJ to determine
6 whether an impairment is severe or not severe. 20 C.F.R. §§ 404.1520, 416.920 (1996). An
7 impairment is "not severe" if it does not "significantly limit" the ability to do basic work
8 activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). The Social Security Regulations and Rulings,
9 as well as case law applying them, discuss the step-two severity determination in terms of what
10 is "not severe." According to the Commissioner's regulations, "an impairment is not severe if it
11 does not significantly limit [the claimant's] physical ability to do basic work activities," 20
12 C.F.R. §§ 404.1520(c), 404.1521(a)(1991). Basic work activities are "abilities and aptitudes
13 necessary to do most jobs, including, for example, walking, standing, sitting, lifting, pushing,
14 pulling, reaching, carrying or handling." 20 C.F.R. § 140.1521(b); Social Security Ruling 85-
15 28 ("SSR 85-28"). An impairment or combination of impairments can be found "not severe"
16 only if the evidence establishes a slight abnormality that has "no more than a minimal effect on
17 an individual's ability to work." Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir.1988)(adopting
18 SSR 85-28).

19 Here, the ALJ found that the claimant had "severe" degenerative disc disease, because
20 that impairment caused significant functional limitation in the claimant's ability to perform basic
21 work activities. After reviewing the record, it appears that the ALJ properly found Plaintiff's
22 additional impairments of Gamekeeper's Thumb, left shoulder pain, hearing loss and arthritis
23 were not severe and/or did not meet the twelve-month duration requirement. For instance,

1 Plaintiff alleges significant limitations caused by Gamekeeper's Thumb beginning in November
2 2003, following a fall on her right hand. X-rays showed mild osteoarthritis involving the MCP
3 joint of the right thumb, but no evidence of fracture or arthritic changes in the right hand (Tr. 22,
4 390-91). Medical records from the Community Health Care Clinic, covering November 2003
5 through February 2004, reference a referral to a hand specialist and a scheduled surgery to
6 correct the right thumb (Tr. 22, 363-70). However, records from Community Health Care Clinic,
7 covering March 2004 through June 2006, and records from Richard Gray, M.D., covering
8 November 2005 through March 2006, documented no other significant complaints regarding the
9 claimant's hands or thumbs (Tr. 22, 361-64, 473-75, 494-519). Dr. Quint noted occasional
10 manipulative limitations due to right thumb discomfort, but as discussed above, the ALJ
11 discounted Dr. Quint's opinion. Dr. Quint noted that his evaluation was incomplete as Plaintiff
12 would not allow him to touch the right hand or forearm (Tr. 22, 301-08). Moreover, Dr. Quint's
13 one-time evaluation does not provide evidence that Plaintiff's condition has last more than just a
14 few months.

17 The ALJ similarly found that Plaintiff's alleged hearing loss, left shoulder pain, and
18 arthritis did not support any finding of a severe impairment related to those ailments. For
19 example, Plaintiff reported to Dr. Quint that she had been deaf in the right ear since 1994, when
20 she was hit by a baseball bat. But, Dr. Quint's findings showed the claimant had normal hearing
21 and that he did not have to raise his voice or repeat himself during the examination (Tr. 306).

23 In March 2006, the claimant reported a new problem with her left shoulder. Dr. Gray
24 diagnosed a rotator cuff tear (Tr. 473). The claimant reported in June 2006 that she was going to
25 have left shoulder surgery, but the record does not provide any evidence of a continuing medical
26 problem. In July 2006, Kathryn Tonder, M.D., the claimant's primary care physician, in a

1 physical valuation, did not list the claimant's left shoulder as one of her problems or impairments
2 (Tr. 496, 524-27). Accordingly, the ALJ found insufficient evidence to show that the claimant's
3 left shoulder problem was more than transient.

4 In July 2006, the claimant reported numbness in the fingers of both hands. Dr. Tonder
5 diagnosed hand pain, rheumatoid arthritis, rated it as marked in severity, and assessed limitations
6 in handling and reaching, she also noted that the diagnosis was pending further evaluation and x-
7 rays (Tr. 522-27). The ALJ noted that records from Dr. Tonder five days later documented no
8 problems with either hand (Tr. 23, 491). The ALJ found insufficient evidence to establish that
9 the problems with the claimant's hands would meet the twelve-month duration requirement.
10

11 With regard to Plaintiff's alleged mental impairments, it appears that the ALJ properly
12 considered Plaintiff's mental impairment(s) as non-severe at step-two. The ALJ stated that he
13 found the medical evidence did not consistently corroborate the claimant's allegations of a
14 mental impairment; and therefore, the ALJ did not find any severe mental impairment.
15 Substantial evidence supports the ALJ's decision.
16

17 The medical evidence is sporadic and inconsistent. In June 2002, a clinical case manager
18 diagnosed major depressive disorder, recurrent, severe, with psychotic features, PTSD, and
19 cocaine abuse (Tr. 282-86). Plaintiff described herself as being virtually immobilized by her
20 depression, spending most of the day sitting in a chair and staying with a relative who took care
21 of the house. *Id.* In March 2003, Plaintiff reported that her suicidal ideation had resolved, and in
22 April 2003, Peggy Spencer, a mental health counselor, noted that the claimant's depression had
23 improved because she had patched up her relationship with the mobile home park manager, was
24 enjoying her new kitten, and had gotten a computer. Despite the apparent progress, Ms. Spencer
25 diagnosed assessed marked limitation in the ability to exercise judgment and make decisions and
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1 marked to severe limitations in several social factors (Tr. 25, 292-97). In June 2003, Ms.
2 Spencer stated that Ms. Hudecek's depression had worsened over the possibility of losing
3 benefits from Department of Social and Health Services (DSHS) and having to move again. But
4 by August 2003, Plaintiff claimant reported her depression and anxiety had decreased after
5 settling into a new place. Later that month, Plaintiff further stated she was spending time with
6 her friends and watching her grandchildren.
7

8 In September 2003, Ms. Spencer noted Ms. Hudecek was actively engaging in
9 prostitution (Tr. 313-59). Thomas Mitchell, an SSI Facilitator with Northwest Special Services,
10 also interviewed Plaintiff in September 2003. He noted that she was calm throughout the
11 interview, tended to be histrionic in relating her story of having lost a large expensive home and
12 very expensive car, and did not exhibit any behavior that would indicate a depressed mind (Tr.
13 143-46). However, in December 2003, Plaintiff was examined by Dr. Price, a consultative
14 psychiatrist. After evaluating Ms. Hudecek, Dr. Price diagnosed depressive disorder, recurrent,
15 moderately severe, and rule out PTSD. He assigned a GAF score of 45-50 (moderate symptoms).
16 Dr. Price noted that there was "almost a sense of stubbornly resisting recovery" and that her
17 prognosis was uncertain. Dr. Price stated that she would recover faster if she were treated with
18 more potent and appropriate antidepressants, which she seemed unwilling to take (Tr. 24, 309-
19 12).

20 Records from Greater Lakes in December 2003 indicated that the claimant was doing
21 well with her diagnosed depression and anxiety, and, in January 2004, Greater Lakes discharged
22 the claimant, noting that she was living independently, trying to get her real estate license
23 renewed, had responded very well to treatment, and had stopped taking her medication.
24
25

1 The record contains no evidence of mental health counseling or evaluations between
2 January 2004 and April 2005. Plaintiff returned to Greater Lakes in April 2005, complaining of
3 depression and isolation. In June 2005, Pamela Sarlund-Heinrich, MA, MHP, diagnosed bipolar
4 II disorder and PTSD. Ms. Sarlund-Heinrich assessed the claimant with marked limitations in
5 her ability to exercise judgment and make decisions, interact appropriately in public contacts,
6 and respond appropriately to and tolerate the pressure and expectations of a normal work setting
7 (Tr. 25, 456-59).

8 Plaintiff's mood appeared to improve again in September 2005, when she reported that
9 she was doing well with her friends and daughter and was in a stable housing situation. In
10 October 2005, Ms. Spencer commented that the claimant was stable in her current setting and
11 that she had some contact with her daughter. In November 2005, Plaintiff complained about
12 depression because of her upcoming back surgery, but because she never returned for a follow-
13 up session, Greater Lakes discharged the claimant from care in March 2006 (Tr. 25, 396, 421,
14 426-33).

15 Finally, in August 2006, Mark B. Whitehill, Ph.D., diagnosed depression NOS,
16 personality disorder NOS, PTSD, and cannabis abuse. He administered the MMPI-II, which
17 yielded an invalid profile "as a result of excessive symptom endorsement (F=120), commonly
18 resulting from severe mental distress, a plea for help, or frank malingering" (Tr. 528-34).

19 It is Plaintiff's burden to produce evidence sufficient to establish a "severe" impairment
20 at step-two of the administrative evaluation process. The ALJ properly relied on the assessment
21 of Dr. Whitehill to find Plaintiff's credibility undermined most of her allegations regarding her
22 mental impairments (discussed above). The medical evidence shows a very inconsistent pattern
23 of behavior, and it is best understood when viewed in light of Plaintiff's credibility and Dr.
24

1 Whitehill's conclusion that Plaintiff often exaggerated and lied about her symptoms. The ALJ
2 stated the same in his opinion, noting the inconsistent medical reports and discrediting Plaintiff's
3 subjective complaints and those medical opinions that relied primarily on her subjective
4 statements. In sum, substantial evidence supports the ALJ's finding that Plaintiff does not suffer
5 from a "severe" mental impairment.¹

6 **C. The ALJ Properly Evaluated Plaintiff's Spine or Back Impairment**

7 The claimant bears the burden of proving that she has an impairment that meets or equals
8 the criteria of an impairment listed in 20 C.F.R. pt. 404, subpt. P, app. 1 (the Listings). Burch v.
9 Barnhart, 400 F.3d 676, 683 (9th Cir. 2004). When a claimant's impairment or combination of
10 impairments meets or equals the level of severity described in the Listing, and also meets the
11 duration requirement, she will be found disabled on the basis of the medical facts alone in the
12 absence of evidence to the contrary (e.g., the actual performance of SGA, or failure to follow
13 prescribed treatment without a justifiable reason). The claimant's impairments must meet or
14 equal a listed impairment for a favorable determination or decision to be based on medical
15 considerations alone. A bare assertion of limitations is not sufficient to support a claim of
16 listing-level severity. Lewis v. Apfel, 236 F.3d 503 (9th Cir. 2001)(ALJ decision affirmed
17 because the claimant had not been compliant with medication.); Tackett v. Apfel, 180 F.3d 1094,
18 1099 (9th Cir. 1999) (a generalized assertion of functional problems is not enough to establish
19 disability at step three).

20 Here, the ALJ found, "The medical evidence indicates that the claimant has a history of
21 back problems, an impairment that is severe within the meaning of the Regulations but not
22 severe enough to meet or medically equal to the criteria of section 1.04 listing in Appendix 1,

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24
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26¹ Having found that the ALJ properly did not find a "severe" mental impairment at step-two, the court will not
address Plaintiff's contention that the ALJ failed to properly satisfy the remaining requirements.

1 Subpart P, Regulations No. 4.” (Tr. 26). Plaintiff maintains her back impairment(s) meet or
2 medically equal Listing 1.04 of the musculoskeletal system.

3 Listing 1.04 provides as follows:

4 1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal
5 stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in
6 compromise of a nerve root (including the cauda equina) or the spinal cord. With:

7 A. Evidence of nerve root compression characterized by neuro-anatomic distribution of
8 pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or
9 muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the
10 lower back, positive straight-leg raising test (sitting and supine); or

11 B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue
12 biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful
13 dysesthesia, resulting in the need for changes in position or posture more than once every 2
14 hours; or

15 C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on
16 appropriate medically acceptable imaging, manifested by chronic nonradicular pain and
17 weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

18 20 C.F.R. pt. 404, subpt. P, appx. 1, § 1.04.

19 The undersigned finds no reference in the record of any compromise or compression of
20 the nerve root, arachnoiditis, or pseudoclaudication. The ALJ summarized the medical evidence
21 in his decision (Tr. 26), which reflects ongoing back pain and treatment. However, the record
22 does not support a finding that Plaintiff's back impairment meets or equals Listing 1.04. For
23 instance, the inability to ambulate effectively is defined as “an extreme limitation of the ability to
24 walk.” 20 C.F.R. 404 Appx. 1 Sub. P, 1.00B2b. In contrast, the record shows Plaintiff is able to
25 ambulate effectively. Based on the foregoing, the undersigned finds Plaintiff did not meet her
burden of showing that the medical findings related to his musculoskeletal system impairment(s)
equal in severity and duration to Listing 1.04.

26 C. *The ALJ Properly Evaluated Plaintiff's Residual Functional Capacity*

1 "[R]esidual functional capacity" (RFC) is "the maximum degree to which the individual
2 retains the capacity for sustained performance of the physical-mental requirements of jobs." 20
3 C.F.R. § 404, Subpart P, App. 2 § 200.00(c) (emphasis added). In evaluating whether a claimant
4 satisfies the disability criteria, the Commissioner must evaluate the claimant's "ability to work on
5 a sustained basis." 20 C.F.R. § 404.1512(a). The regulations further specify: "When we assess
6 your physical abilities, we first assess the nature and extent of your physical limitations and then
7 determine your residual functional capacity for work activity on a regular and continuing basis."
8 Id. at § 404.1545(b). If the RFC assessment conflicts with an opinion from a medical source, the
9 adjudicator must explain why the opinion was not adopted. 20 CFR §§ 404.1527, 416.927.

10
11 Plaintiff's RFC was assessed by the ALJ as follows:

12 After careful consideration of the entire record, the undersigned finds that the
13 claimant has the residual functional capacity to lift/carry 10 pounds occasionally
14 and five pounds frequently, stand/walk two hours in an eight-hour workday, and
15 sit six hours in an eight-hour workday. The claimant should have routine breaks
within the normal workday to allow for stretching and changing positions.

16 Tr. 26. The ALJ further explained that in making this finding he reviewed Plaintiff's credibility,
17 lay witness statements and the medical opinions. Tr. 28.

18 Plaintiff argues the ALJ's RFC finding does not address or include all of her limitations.
19 Plaintiff's argument is premised in large part on the contention that the ALJ erred when he
20 evaluated the medical evidence (the severity of her back impairment and mental limitations) and
21 Plaintiff's testimony. As discussed above, the ALJ properly considered the medical evidence
22 and he discounted or rejected certain opinions relied on by Plaintiff to make this argument.
23 Likewise, the ALJ properly considered and discounted Plaintiff's testimony, as well as the
24 medical opinion evidence that relied on Plaintiff's subjective complaints, that would support
25 greater limitations than concluded by the ALJ.

1 After reviewing the record and ALJ's RFC finding, the undersigned finds that it is
2 supported by substantial evidence.

3 **D. The ALJ Properly Completed Step-Four Of The Administrative Process**

4 At step four, a claimant has the burden of showing that he or she can no longer perform
5 past relevant work. 20 C.F.R. §§ 404.1520(e) and 416.920(e); Clem v. Sullivan, 894 F.2d 328,
6 330 (9th Cir.1990). Once the claimant has shown this, the burden at step-five shifts to the
7 Secretary to show that, taking into account a claimant's age, education, and vocational
8 background, the claimant can perform substantial gainful work in the national economy. 20
9 C.F.R. §§ 404.1520(f) and 416.920(f); Moore v. Apfel, 216 F.3d 864, 869 (9th Cir.2000).

10 Although the burden of proof lies with the claimant at step four, the ALJ still has a duty
11 to make the requisite factual findings to support his conclusion. SSR 82-62. See 20 C.F.R. §§
12 404.1571 and 416.971, 404.1574 and 416.974, 404.1565 and 416.965. This is done by looking at
13 the "residual functional capacity and the physical and mental demands" of the claimant's past
14 relevant work. 20 C.F.R. §§ 404.1520(e) and 416.920(e). The claimant must be able to perform:

- 17 1. The actual functional demands and job duties of a particular past relevant job; or
- 18 2. The functional demands and job duties of the occupation as generally required by
19 employers throughout the national economy. SSR 82-61. This requires specific findings as to the
20 claimant's residual functional capacity, the physical and mental demands of the past relevant
work, and the relation of the residual functional capacity to the past work. SSR 82- 62.

21 Pinto v. Massanari, 249 F.3d 840, 844-845 (9th Cir. 2001).

22 Here, the ALJ found Plaintiff retained the ability to perform past employment, working
23 as an administrative assistant. Plaintiff argues the ALJ erred because he failed to incorporate (1)
24 Dr. Virgi and Dr.Quint's opinions that reflect Plaintiff's handling, fingering, and manipulative
25 limitations, and (2) Plaintiff's non-exertional limitations, which would preclude her from
26 performing this type of job.

The ALJ specifically discounted the opinions of Dr. Quint, Dr. Tonder, and the State agency medical consultant (Dr. Virji) “to the extent they rely on any impairment with respect to the claimant’s hands.” Tr. 29. As noted above, the ALJ discounted any medical opinion that relied on Plaintiff’s untrustworthy statements. There is substantial evidence that Plaintiff’s hand or fingering limitation, if any, is not severe. Moreover, at the hearing the vocational expert considered Plaintiff’s testimony and the ALJ’s RFC, and the vocational expert was asked about Plaintiff’s past work as an administrative assistant. The vocational expert described the work as sedentary type work. Tr. 600-601. The court finds no error in the ALJ’s assessment of plaintiff’s past relevant work and her retained capacity to perform work as an administrative assistant.²

CONCLUSION

Based on the foregoing discussion, the Court should affirm the administrative decision.
Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
parties shall have ten (10) days from service of this Report to file written objections. *See also*
Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for
purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **May 1,**
2009, as noted in the caption.

DATED this 7th day of April, 2009.

J. K. Ward (materna)

J. Richard Creature
United States Magistrate Judge

² Having found the ALJ properly concluded Plaintiff retained the ability to perform past relevant work at step-four in the administrative process, the court will not address Plaintiff's contention that the ALJ failed to complete step-five.